General Electric Company *and* United Electrical, Radio and Machine Workers of America (UE). Cases 6–CA–24454 and 6–CA–26117

October 27, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On July 10, 1996, the Board issued its Decision and Order affirming the administrative law judge's decision.[1] The Respondent and the Union filed petitions for review before the United States Court of Appeals for the District of Columbia Circuit. On July 18, 1997, the court issued its decision,[2] enforcing in part and denying in part the Board's Decision and Order, and remanding one issue to the Board for reconsideration. Thereafter, the Board accepted the remand, and invited and received statements of position from all of the parties.

The Board has reconsidered its Decision and Order in light of the court's remand, the parties' statements of position and the entire record, and makes the following findings, conclusions, and recommendations.

The sole issue on remand is whether, after consideration of certain Board precedents cited by the Court, we should reaffirm the Board's earlier adoption of the administrative law judge's finding that the Respondent's handbill language set forth below suggested that the employees faced futile bargaining and an inevitable strike if they voted for the Union, in violation of Section 8(a)(1) of the Act. In relevant part, the handbill stated:

> THE REAL QUESTION
>
> You know of the union's position on 12-hour shifts, wages, benefits. . . .
>
> You know the company's position on these very same issues. . . .
>
> The company and the union organizers are MILES APART!
>
> Are you willing to see this Site possibly become another victim in *long, bitter negotiations*?
>
> Are you willing to face the possibility of a *long and ugly strike*.
>
> VOTE NO! [Emphasis in original.]

The judge posited his finding of a violation on the standard set forth in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969), which states:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based upon misrepresentation and coercion, and as such without the protection of the First Amendment.

The Board adopted the judge's conclusion that, because the Respondent failed to express its willingness to bargain in good faith over its economic differences with the Union, "[t]he handbill implies that the employees' choice is either to reject UE or face the futility of 'long bitter negotiations' and 'a long and ugly strike,'" which would be the *only* way for the employees to retain their existing economic benefits.

The court observed that, in its opinion, the judge erred by converting a statement of possibility into a statement of certainty, and then declaring it a violation of the Act. The court compared the above handbill language with that in two prior Board cases in which the Board had found what the court regarded as nearly identical statements to be lawful. In the first of those cases, *UARCO, Inc*., 286 NLRB 55, 76–79 (1987), the court observed that the Board found no problem with the employer's references to the mere possible negative outcomes of unionization conveyed by its statements that "the UAW has a long and tragic record—right here in Kentucky—of forcing lengthy, vicious and destructive strikes . . . [and urging employees not to] let this outside union force you and your company into a knockdown and drag out fight." In *Coleman Co*., 203 NLRB 1056 (1970), the other cited case, the court noted that the Board found lawful a company manager's statement to employees that "a vote for the [union] would put us back to the bargaining table which is a long and expensive process, and who knows, we might wind [up] in another strike." The Board found that the above statement "in no way convey[ed] the impression that action will be taken by the Employer to cause a strike," and was lawful.

Upon reconsideration of our decision, we find, in agreement with the court, that the language in issue is lawful and that the cited cases are not distinguishable. We shall therefore reverse our earlier decision and dis-

[1] 321 NLRB 662.

[2] 117 F.3d 627 (D.C. Cir. 1997).

miss the complaint allegation relating to the Respondent's handbill entitled, "The Real Question."

Contrary to our dissenting colleague, we find that the Respondent's statements in issue contain no threats or coercion, but are consistent with the Respondent's potential obligation to engage in collective bargaining. Such references to the parties' extremely divergent positions prior to bargaining only contrast the Respondent's existing terms and conditions of employment for its unrepresented employees with the provisions in the current collective-bargaining agreement with the Union covering all of the Respondent's represented employees. This actual context formed an objective basis for the Respondent's further references to long, bitter negotiations and to the possibility of long and ugly strikes, and merely reflect an industrial reality that employees are capable of understanding. Whether such statements also include any reference to the existence of a union's strike history, as in the cited cases, it does not affect its lawfulness. In the words of the court, our dissenting colleague, in finding a violation here, has taken the Respondent's predictions of reasonably likely consequences in the circumstances, and converted them to threats of the certainty of advance consequences.

We do not agree with our colleague that the Respondent was effectively telling employees that selection of the Union would be a futile act. Rather, the Respondent was telling the employees that, because of the positions of the parties, the negotiations could be long and bitter and a strike could be long and ugly. The Respondent was *not* telling its employees that union representation would be futile. Rather, the Respondent's explanation was consistent with how the Act operates in practice. If parties are sharply divided on an issue, negotiations can, indeed, become protracted and bitter. This is not to say that such negotiations are in bad faith. Further, strikes can be long and ugly, and yet lawful under the Act. Finally, unions often achieve their aims through such strikes. In sum, the Respondent was not telling employees that representation would be futile.

ORDER

The complaint allegation relating to the Respondent's handbill entitled, "The Real Question," is dismissed.

MEMBER FOX, dissenting.

I respectfully disagree with my colleagues in the majority and would reaffirm the Board's original finding that the language of the handout titled "The Real Question" clearly suggested to employees that the Respondent, in response to the Union's demands, would assume a bargaining posture that would inevitably force the Union into a strike, and that therefore selecting the Union as a bargaining representative would be a futile act. In reaffirming that finding I would, as explained below, distinguish the Board's decision in *UARCO, Inc*., 286 NLRB 55 (1987), and overrule the Board's decision in *Coleman Co*., 203 NLRB 1056 (1970).

As noted by the majority, the Supreme Court in *Gissel*[1] stated that any employer prediction concerning an adverse impact of unionization, to be lawful, must contain an explanation predicated on objective facts beyond the employer's control, to avoid conveying to employees that the employer's own hostility against the union will motivate the predicted adverse impact.

My colleagues clearly misread *UARCO, Inc*., supra, insofar as they rely on it as support for a dismissal of the instant allegation. Central to the Board's analysis in that case was the context in which the employer's statements were made. Thus, the Board stated:

> In evaluating the Respondent's preelection campaign, we begin from the premise that the oral and written statements must be construed together to determine their reasonable tendency to coerce the employees. Both the courts and the Board have long held that statements and written materials must be viewed in context and not in isolation.

In concluding that in *UARCO*, where the employer's campaign propaganda was found lawful, the Board relied on the absence of express threats of any kind in the written materials, and the oral assurances that the employer would bargain with the union and that bargaining could go up or down. In this context, the Board found that the employer's partisan reference to a "UAW strike," linked to a reference to that particular union's "tragic record . . . of forcing lengthy, vicious, and destructive strikes," was a lawful expression of opinion protected by Section 8(c).

In contrast, the court's affirmance in this case of the Board's findings of a series of threats of retaliation by the Respondent during the instant election campaign unequivocally demonstrates that the Respondent was not merely interested in expressing lawful opinion. Specifically, the Board found that the Respondent threatened employees with several forms of retaliation should they vote to be represented by the Union, and these findings have been enforced by the court. Supervisor Brannon threatened employees that the plant would close and that the Respondent would abandon the preferred 12-hour shift assignments. Further, the Respondent widely disseminated multiple electioneering handbills which unlawfully threatened layoffs if the Union won the election. The Board found that these handbills also unlaw-

[1] *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969).

fully threatened the loss of employees' "exempt" status and the loss of a variety of benefits and conditions of employment currently enjoyed by employees. In this context, the Respondent's campaign literature reciting the vast separation of the parties' positions and its warning of "long, bitter negotiations" and a "long and ugly strike," is a further evocation of the Respondent's refrain of retaliatory forewarnings.[2] In that context, and absent any factual underpinning for its prediction or showing that such consequences were beyond the Respondent's control, the message strongly implied to employees that the Respondent's repeated threats of retaliation would infuse its bargaining tactics and would be a driving force behind long, bitter negotiations which would, in turn, force a long and ugly strike. Accordingly, the critical factor in *UARCO*, i.e., the employer's repeated oral assurances to employees that it would bargain with the union to provide a context for the employer's campaign literature, is not present in the instant case.

I accept the view of the court of appeals that it is very difficult to square the Board's decision in *Coleman Co*., supra, with the finding of the violation at issue on the remand in this case. I would overrule *Coleman* because I believe it was wrongly decided. The analysis in *Coleman*, unlike that in *Uarco,* utterly fails to take into account the context in which the statements concerning strikes were made. The judge in *Coleman* had found that the company president repeatedly made implied promises of benefit, suggesting that numerous currently unsatisfactory conditions of employment (such as the hospital and retirement plans and wage standards for flat-rate workers) could be promptly addressed after the election "without the benefit of a third party." By contrast, the picture presented by the president of the situation with union representation was one in which the employees would languish while a scenario played out featuring a lengthy process at the bargaining table and "another strike" that the company "might win." Thus, the judge found that the president made the following remarks at two different meetings with employees (id. at 1059–60):

> If you vote for the Union, you're going to be locked in for 6 or 7 years-before you can get rid of them and if you vote for the company, if you don't like what we do in a year, you can get a union-a vote for the International would put us back to the bargaining table which is a long and expensive process, and who knows, we might win in another strike-we like to ask you to give the company a chance.
>
> . . . .
>
> If you vote for the Union, you'd have to go back to the bargaining table and start from scratch, and negotiations are long and expensive and they take time and you might end up in another strike. . . . If you'll vote for the Company, I'll guarantee you that you'll never have any less than you've got right now. From here, we'll take what we have and we'll build on it. With the Union, you don't have any guarantee.

The judge in *Coleman* found those statements to be unlawful threats of reprisal if the union were selected and the statements about improvements in conditions which the company would make on its own to be unlawful promises of benefit. Id. at 1060. The Board reversed the finding of threats, holding that the company president's statements about strikes could not be viewed as unlawful threats. In so finding, the Board simply quoted parts of the sentences containing the references to strikes, totally ignoring the context created by the unlawful promises of benefit. (The Board adopted without comment the judge's promise of benefit findings.) Thus, it failed to acknowledge the clear message to employees that the company was motivated to act quickly to improve their working conditions if the employees voted against the union, but its actions if a union were in the picture would result in a stalled bargaining process that would likely goad the union into striking—a strike that the company "might win." Because I would find that message clearly coercive within the meaning of Section 8(a)(1) of the Act, I would overrule *Coleman*.

In sum, for the reasons stated above, I would reaffirm the Board's finding that the Respondent's handbill violated Section 8(a)(1) of the Act.

[2] I note that the Respondent's conduct also included the unlawful grant of benefits to employees both before the election, by providing employees with free workgloves, and continued after the election, which the Union lost, by providing all employees with a clock and an expression of thanks. The Board found in the initial proceeding that this was the classic "fist inside a velvet glove," and amounted to further threats of retaliation should the employees not oblige the employer.